No. 21704

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON THE BEACHCOMBER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

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Jurisdiction.

This case is before the Court upon the petition of Don The Beachcomber pursuant to Section 10(f) of the National Labor Relations Act, as amended, for review of an order of the National Labor Relations Board, issued March 7, 1967. The decision of the Board and order are reported at 163 NLRB No. 36. This Court has jurisdiction of the proceedings as the unfair labor practices charged were alleged to have been engaged in at Palm Springs, California, where petitioner operates a restaurant. The Board, in its answer to the petition, admits the jurisdiction of this Court. No jurisdictional issue is presented by this case. In addition to its answer, the Board has filed a cross-petition seeking enforcement of its order. The applicable portion of the Act is found at 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*

Statement of the Case.

Petitioner operates two well-known restaurants, one in Hollywood and another in Palm Springs, California.

On March 8th or 9, 1966, the union (Culinary Workers, Bartenders and Hotel Service Employees Local 535, AFL-CIO) made a demand for recognition, claiming an "overwhelming majority of your employees have signed authorization cards for us to represent them." [General Counsel's Ex. 4.]

No further reference described the unit of employees the union claimed to represent.

The union requested an appointment within ten days to discuss an agreement on behalf of "your employees" at Don The Beachcomber in Palm Springs.

However, on March 15, 1967, before the ten-day period had expired, the union filed a petition with the Board seeking a Board-conducted election. Petitioner's reply to the demand also suggested an election. [See General Counsel's Ex. 5.]

Nash Aranas was the Service Manager for both the Hollywood and Palm Springs restaurants. He was responsible for supervising the waiters and buy boys, by tradition (including Aranas), of Filipino extraction. [R. T. 313.]

Aranas usually spent the weekends at the Palm Springs restaurant. After the demand was received, on the next weekend, Aranas asked Federico Nobello, a Filipino bus boy, if he had signed a piece of paper. Nobello said he had. On cross-examination, Nobello testified Aranas told him he did not know if he could take him to Hollywood to work after the Palm Springs season because there was no union at Hollywood and

he did not know if someone from a union restaurant could work in a non-union restaurant. [R. T. 106.]

Later, Aranas learned this situation presented no conflict and Nobello was taken to Hollywood to work after the end of the Palm Springs season. [R. T. 106, 360-361.]

Aranas also asked Ben Jordan, a waiter and also his brother-in-law and friend of many years, if he had signed a card. Jordan said he had, and suggested holding a meeting of "the boys" at his home so Aranas could come and hear from them why they had signed cards. [R. T. 303-304.]

A meeting was called by Jordan and held in the living room of Jordan's house. [R. T. 146.] It was attended by 15 or 16 Filipino bus boys or waiters, most of whom Aranas had known for many years. It lasted for approximately two hours. Coffee was served, many of the boys either dozed off or chatted in the kitchen at one time or another.

There was a general discussion in which many of the boys stated the reasons for signing cards.

At the meeting, Aranas told the boys they could join the union if they wished, but they should talk about it. He pointed out what he believed to be the disadvantages of joining. [R. T. 108, 145.]

The hours worked by the waiters and bus boys were not firmly fixed. Many of them worked 6 or 7 days a week, and because much of their income was derived from tips, it was to their advantage. Aranas told them the union might want overtime pay and the restaurant might not be able to afford it, so they might end up working fewer days each week. [R. T. 264-265.]

The waiters followed a double rotation system. There were some waiter stations that were better than others. The older waiters rotated on these better stations while the younger waiters rotated on the other stations. Aranas told them the union might want all of the waiters to rotate together. [R. T. 266-269, 356.]

The main union witness, Leonard Mandapat, testified that after the meeting, Aranas approached him and stated, "so you are one of the union organizers." After a suggestion the statement was not coercive and some prodding, he then remembered Aranas had also said "you boys are crazy, you don't know what you are going to be missing if you join the union." Aranas denied the conversation. [R. T. 183-184, 364.]

Mandapat also testified Aranas, on another occasion, told him he was afraid the boys were going to lose their jobs if they supported the union. Aranas denied the statement. [R. T. 364.]

Mandapat also testified Aranas told him there was no chance for him to work in Hollywood. Aranas denied the statement. [R. T. 364.]

The unit was comprised of 52 employees. At the hearing, General Counsel, over objection, placed 26 authorization cards into evidence and testimony that Jok Chan, a cook, was a dues-paying member of the union. This was the "overwhelming majority" claimed by the union.

Hanning testified she did not know any of the people who purportedly signed the cards, except Tana, and that she had no first-hand knowledge that four of the cards

which she attempted to authenticate had been signed by the purported signatories. [R. T. 30-40.]

Tana testified that he did not see one of the cards he secured signed. [R. T. 120.]

Mandapat's attempt to authenticate the cards must be read to be appreciated. It is replete with conflicting statements, changes in testimony and inconsistencies. [R. T. 220-257.]

The Trial Examiner and the Board accepted the cards, credited Mandapat, found Aranas had violated Section 8(a)(1) of the Act, and held Petitioner had refused to bargain in good faith. Its order directs Petitioner to recognize and bargain with the union.

Specification of Error.

1. The Board erred in admitting into evidence union authorization cards.

2. The Board erred in finding that Jok Chan had authorized the union to act as its bargaining agent in connection with his employment at Don The Beachcomber.

3. The Board erred in crediting Leonard Mandapat in the face of obviously false affidavits on his part.

4. The Board erred in holding Aranas violated Section 8(a)(1) of the Act, as amended.

5. The Board erred in finding that Petitioner had no good faith doubt about the union's alleged majority.

6. The Board erred in finding that Petitioner violated Section 8(a)(5) of the Act, as amended.

ARGUMENT.

1. The Authorization Cards.

Petitioner submits it was grossly unfair to admit any authorization cards into evidence, except those identified by the purported signatories.

General Counsel knew well in advance of the hearing which employees he would attempt to prove signed cards and it would have been no hardship for him to produce such employees at the hearing.

Petitioner, on the other hand, had no knowledge of what cards would be presented until the hearing began.

After the hearing commenced and the names became known, it constituted a hardship on Petitioner to have subpenas issued and served on witnesses scattered all over Southern California.

As another alternative, Petitioner would have had to produce specimen signatures and a handwriting expert, the cost of which is prohibitive.

Even such a solution would be unsatisfactory because it does not include the presentation of any evidence of the circumstances under which the cards were obtained.

For example, in this case, the cards of several employees were apparently obtained because they were told they would get increased wages and health insurance if they signed them [R. T. 54-55], an obvious misrepresentation of fact in view of the provincial nature of the people involved. [R. T. 450-455.] The cards should not have been counted. *NLRB v. S. E. Nichols Company,* 2nd Cir., June, 1967, ... F. 2d .....

It is small wonder that unions, lawyers, writers, the Board and the Courts have said that authorization cards

are an unreliable means of determining whether or not an employee wishes a union to represent him. *A Guidebook For Union Organizers,* published by Industrial Union Department, AFL-CIO, Sept., 1961 ("NLRB pledge cards are at best a signifying of intention at a given moment. Sometimes they are signed to 'get the union off my back' "). The Regulation of Campaign Tactics In Representation Elections Under The National Labor Relations Act, 78 *Harvard Law Review* 38. ("But it is widely conceded that authorization cards are an unreliable index of support"). Authorization Cards As An Indefensible Basis For Board Directed Union Representation Status: Fact and Fancy, Commerce Clearing House, *Labor Law Journal,* April, 1967. *Sunbeam Corp.,* 99 NLRB 546. *N.L.R.B. v. Flomatic Corp.,* 2nd Cir., June, 1965, 347 F. 2d 74.

But over and above considerations of fairness, the introduction of any card not authenticated by the person purportedly signing it constitutes hearsay. If it is true the cards are introduced as evidence that those signing them have designated the union as their agent for collective bargaining, they constitute out of court statements introduced to prove the truth of the facts recited therein and are hearsay.

In addition, one of the cards was not authenticated at all, Tana testifying that he did not see Antonio Landeros sign the card. [R. T. 120-121.]

Finally, those cards which Mandapat attempted to authenticate should be rejected as a group. His testimony on the signing of the cards is not worthy of belief, especially when read in conjunction with the affidavits he gave to General Counsel [R. T. 166-257],

and the fact he gave what must be regarded as purposely false affidavits to General Counsel during the investigation of the union charge.

2. Jok Chan.

General Counsel sought to prove the union's majority by showing that Jok Chan was a due-paying member of Local 535 on March 8, 1966. Otherwise, General Counsel had only 26 cards out of a 52-man unit. The fact is that Chan was initiated into Local 226 in Las Vegas, Nevada. He later transferred to Local 535 in connection with a job in El Centro, California. [R. T. 73, 82.]

There is not a shred of evidence that Jok Chan ever intended to designate Local 535 as his agent for collective bargaining in connection with his employment at *Don The Beachcomber in Palm Springs, California.*

3. Leonard Mandapat.

The credibility of Leonard Mandapat is an important issue in this case. His testimony was used to authenticate 13 of 26 authorization cards. It was Mandapat who attributed many of the coercive statements to Aranas.

It is a disgusting turn of events when the Board chooses to credit a witness who has submitted false affidavits to it in connection with General Counsel's investigation of the charge.

A reading of the two affidavits which Mandapat submitted to the Board, when compared with the admissions he made on cross-examination, make it obvious he gave General Counsel completely and purposely false affidavits.

Apparently, General Counsel became aware of this while preparing for hearing and moved to dismiss paragraph 17 of the complaint at the hearing.

Mandapat gave sworn statements to General Counsel to the effect the day after the meeting at Jordan's house his waiter assignments were changed so he made less money. He stated that on March 12, 1966, a Saturday night, he hardly waited on any customers, but people were waiting in line to eat, and he made only $5.00 in tips that night. He went on to state that he used to average $150 to $175 each week in tips, but that afer the meeting, his tips decreased by fifty percent.

On cross-examination, Mandapat admitted that on Saturday nights he normally sold between $250—$300 worth of food, and that on Saturday, March 12, he sold $281 worth of food. [R. T. 299.]

It does not seem believable that he then made $5 in tips on sales totaling $281.

Petitioner then introduced evidence in the form of company records to show that Mandapat's tips did not decrease by 50% after March 12th. His tips for the first four months of 1966 were:

January	209.50
February	208.00
March	199.00
April	222.00

[Resp. Ex. 4, R. T. 392-393.]

On the night of March 12th, Mandapat was not just standing around and his tips did not decrease thereafter. They increased.

Mandapat was otherwise discredited. His testimony about the signing of the authorization cards is full of

contradictions and conflicts with the affidavits given General Counsel on the points in question.

He certainly did not see Enrique Placencia and Paul Vasquez sign cards. He had written his own name on the back of every card he had obtained, as he had been instructed, but his name does not appear on the back of their cards. [General Counsel's Ex. 3(r) and 3(t).]

4. The Section 8(a)(1) Violations.

The direct or cross examination of each witness testifying about the meeting at Jordan's house makes it clear that everything Aranas said was protected by Section 8(c) of the Act, as amended. [R. T. 133-134, R. T. 264-265, R. T. 265-266, R. T. 269, R. T. 354-355, R. T. 356.] See *N.L.R.B. v. Morris Novelty Co., Inc.,* 8th Cir., June, 1967, ... F. 2d .....

Aranas never stated that hours or the rotation system would be changed if the union came into the restaurant. He simply was stating his opinions and arguments that the union might require certain things to be done which, in turn, might require the company to take certain necessary steps. If what Aranas said is illegal, Section 8(c) is meaningless.

There was nothing coercive in Aranas asking Nobello and Jordan (separately) if they had signed cards.

Jordan was his long time friend and brother-in-law.

The statement to Nobello about not being able to work in Hollywood was only a statement that he did not know if a man from a union house could work in a non-union house. When he found out the correct answer, Nobello went to Hollywood.

The testimony of threats to Mandapat by Aranas should be disregarded. Mandapat was a discredited witness.

Aranas did not arrange, suggest or participate in a "poll" of employees. A waiter, Ben Jordan, invited him to a meeting so "the boys" could tell him why they had signed cards.

All of the waiters and bus boys at the meeting knew Aranas was there, including Mandapat, and no one objected to his presence.

Further, Aranas made it clear at the meeting that he was not opposed to the union [R. T. 132-133], and they were free to join if they wished. See *National Can Corp. v. N.L.R.B.*, 7th Cir., March, 1967, 374 F. 2d 796. *N.L.R.B. v. O. A. Fuller Super Markets, Inc.*, 5th Cir., March, 1967, 374 F. 2d 197.

5. Good Faith Doubt and Violation of Section 8(a)(5).

There is no credible evidence Petitioner had a bad faith doubt concerning the union's claim of a majority and set out to undermine it.

Initially, it should be noted the union filed a petition for an election before Petitioner ever had a chance to respond to its letter of March 8, 1966. Petitioner did not receive the letter until March 9, 1966. On March 15, the petition was filed, four days before the 10 day period set forth in the letter expired.

It should also be noted the March 8th letter failed to unambiguously describe an appropriate unit of employees. See *N.L.R.B. v. Morris Novelty Co., Inc., supra.*

The initial company response indicated it preferred a Board-conducted secret ballot election.

The main objection seems to be that Petitioner preferred to have the election at a date when all of the

employees who would be effected by the outcome of the election would have a chance to vote. The restaurant was planning to close within a few months, as it normally does for the summer and early fall and the closing would be preceded by lay-offs. Normally, there would be a significant number of new employees the following season and Petitioner wanted the election to be held at the start of the new season so these new employees could vote on their future.

The evidence in this case does not support a finding that Petitioner acted in bad faith in refusing to bargain with the union and insisting upon a Board conducted election. *Wasau Steel Corp. v. N.L.R.B.*, 7th Cir., April, 1967, ... F. 2d ..... *Peoples Service Drug Stores v. N.L.R.B.*, 6th Cir., April, 1967, 375 F. 2d 551. *Hercules Packing Corp.*, 163 N.L.R.B. No. 35.

Conclusion.

General Counsel failed to prove the union represented a majority of the 52 unit employees at the time of its demand for recognition.

There is no substantial evidence Petitioner violated Section 8(a)(1) through Aranas or that it did not have a good faith doubt about the alleged majority status of the union and thus violated Section 8(a)(5).

For the reasons above stated, the cross petition for enforcement should be dismissed and the Board's order set aside.

Respectfully submitted,

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Don The Beachcomber.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

M. J. Diederich